

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7095

To Be Argued By
JOHN W. FINLEY, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7095

TRIEBWASSER & KATZ, a partnership consisting of
JONAH TRIEBWASSER and WILLIAM KATZ,

Plaintiff-Appellee,

- against -

AMERICAN TELEPHONE & TELEGRAPH COMPANY, NEW YORK
TELEPHONE COMPANY and REUBEN H. DONNELLEY CORPORATION,

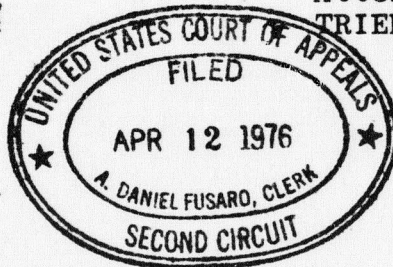
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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ISSUES PRESENTED FOR REVIEW.

1. Did the District Court abuse its discretion in granting to Triebwasser & Katz a preliminary injunction -

(a) by reliance on the legal criteria employed?

(b) upon the matters embraced by the record?

2. If, arguendo, an abuse of discretion could be premised, does it assume proportions meriting reversal?

STATEMENT OF THE CASE

This litigation arises out of the claim of TRIEBWASSER & KATZ, a licensed private investigative agency ("Katz" herein), that the defendants NEW YORK TELEPHONE COMPANY and AMERICAN TELEPHONE & TELEGRAPH COMPANY are engaged in a conspiracy reflected in New York Telephone Company's policy of refusing to publish advertisements in the classified telephone directory relating to "debugging" services, and that such activity constitutes a violation of Federal and State antitrust laws, Federal civil rights law and State penal law. The defendants-appellants are AMERICAN TELEPHONE & TELEGRAPH COMPANY ("AT&T"), the NEW YORK TELEPHONE COMPANY ("N.Y. TELCO") and THE REUBEN H. DONNELLEY CORPORATION ("DONNELLEY").

On February 17, 1976, plaintiff filed its complaint seeking both injunctive relief and damages of \$1 million against N.Y. TELCO, the publisher of classified telephone directories ("Yellow pages") for the New York metropolitan area, AT&T (N.Y. TELCO's parent corporation) and DONNELLEY, an advertising sales representative for the Yellow Pages.. On the same day, proceeding by order to show cause, the plaintiff moved for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. The order to show cause contained a temporary restraining order enjoining the defendants "from in any way

proceeding with or effecting the publishing of any and all of the Yellow Pages for the metropolitan New York area" pending the hearing of plaintiff's motion. (26A).

Pursuant to the order to show cause, a hearing was held six days later, on February 23, 1976. It lasted approximately one-half day, with plaintiff WILLIAM KATZ as the only witness called to testify. Appellants offered no testimony. On February 25, 1976, the District Court issued an order granting the plaintiff's motion for a preliminary injunction and enjoined the defendants from refusing to accept plaintiff's advertisement (336A) for publication in the Yellow Pages on the ground that it does not comply with the internal operating procedures of the Defendant N.Y. TELCO. (295A-296A). This ruling, the Appellants now challenge.

On February 26, 1976, the District Court filed an opinion setting forth the reasons for its decision (298A). The District Court found that from the uncontested statements of AT&T's attorney CAMING in prior administrative proceedings that AT&T, N.Y. TELCO and DONNELLEY shared the intent "...to restrain the public to the best of their ability, from contacting debuggers." (308A). Plaintiff was found to have raised serious questions going to the merits regarding the existence of an intercorporate conspiracy between AT&T, N.Y. TELCO and other companies in the Bell System which unreasonably "restrains and suppresses the

debugging business" in violation of Section 1 of the Sherman Act and that "the balance of hardships in this case tips decidedly in favor of (it may be more apt to say against) the plaintiffs." (310A).

Defendants filed a Notice of Appeal on March 5, 1976. (314A). At the same time, defendants moved, pursuant to Second Circuit Rule 27(e), for an expedited appeal. The motion for an expedited appeal schedule was granted by this Court, Gurfein, J., on March 12, 1976. (315A).

STATEMENT OF FACTS

AT&T is the parent corporation of N.Y. TELCO. AT&T is also the parent corporation of 22 other operating telephone companies which, with N.Y. TELCO, constitute a part of the Bell System. (129A).

N.Y. TELCO, a wholly-owned subsidiary of AT&T, provides telephone services as a public utility in the State of New York and its intrastate activities are regulated by the Public Service Commission of the State of New York. N.Y. TELCO publishes and furnishes to its subscribers two kinds of telephone directories, the alphabetical or White Pages telephone directories and the classified or Yellow Pages directories. The White Pages are part of the telephone services that N.Y. TELCO provides to its subscribers and are under the supervision of the Public Service Commission. Yellow Pages directory advertising is not regulated by the New York State Public Service Commission. In the Yellow Pages, N.Y. TELCO furnishes, without charge, a listing under the appropriate heading for its business subscribers; and in addition each business subscriber who elects to do so may purchase advertising in the Yellow Pages. The revenues from Yellow Pages advertising are reported to the Public Service Commission and serve to offset the overall costs of providing telephone services to N.Y. TELCO subscribers in the State of New York. (68A-73A). DONNELLEY is N.Y. TELCO's exclusive advertising agent.

Plaintiff is a private investigative agency and received its license to engage in this business in New York on January 14, 1976. (7A-8A). In going into this business, plaintiff (having no earnings history and having just been formed) speculated that its first year's revenues would approximately be \$40,000 to \$50,000, based upon the experience of other companies that it studied. KATZ estimated that "50 to 60 per cent of the business would be countermeasures." (281A).

In early February, 1976, plaintiff submitted to DONNELLEY, N.Y. TELCO's sales representative for the Yellow Pages in the New York City metropolitan area, a proposed advertisement which stated in part: "We can detect and remove unwanted and illegal electronic listening devices from your telephone, home or office." Applying N.Y. TELCO's standards for such advertisements in the Yellow Pages, DONNELLEY rejected the proposed advertisement. (62A).

In conjunction with DONNELLEY, plaintiff then revised a portion of the advertisement for its private investigative services and this revised advertisement was accepted by N.Y. TELCO. However, N.Y. TELCO would not yield with respect to the other half of the advertisement offering plaintiff's services in detecting and removing unwanted and illegal listening devices. This action followed. (258A-261A).

The N.Y. TELCO standard to which plaintiff objects is as follows:

"Advertising, whether by text or illustration, may not state or imply that wiretapping or eavesdropping is performed by the advertiser or that he has available equipment or devices for such purposes. This policy has always been interpreted as prohibiting not only advertising of wiretapping and eavesdropping devices and services but also so-called debugging advertising (i.e., advertising stating or implying devices or services will be provided for the detection and removal of wiretaps and eavesdropping "bugs") since those who can debug also generally possess, or the public believes they possess, the capability to bug and wiretap." (21A).

The quoted policy, shorn of verbiage, presupposes a predisposition if not an outright intent on the part of potential advertisers like plaintiff, to wrongfully install and operate illegal and surreptitious listening devices. No empirical or other justification for this policy, other than its own internal "logic" was offered by the defendants. (78A).

There are no other competing classified telephone directories in N.Y. TELCO's area of operations affording anything remotely like the coverage and exposure, country-wide, of the "Yellow Pages." (82A-87A). KATZ further testified that plaintiff would be required to spend \$2,400,000 (200 times the cost of its proposed advertising budget) to reach the same market as the Queens County Yellow Pages. (111A).

N.Y. TELCO's policy is, in connection with the proposed advertising, dictated by AT&T (129A-131A).

The sworn statement of N.Y. TELCO's Mr. Bennett, labelling AT&T's activity as simply the offering of "suggestions" or "recommendations" and N.Y. TELCO's as simply a "not binding" receipt of same (8-A) is in direct conflict with the testimony of AT&T's H.W. William Caming, Esq. who stated "...in the area of security matters, the policy of the Bell System is set by the American Telephone and Telegraph Company after appropriate review and concurrence by the associated companies." (129-A, emph. supp.).

That the plaintiff's contention does not rely solely on the testimony of Mr. Caming in another proceeding is clearly evident from plaintiff KATZ' affidavit: "Rather than as Bennett suggests the defendant AT&T does not merely suggest standards and practices, but rather to use the vernacular, 'rams it down the throats' of their subsidiaries. It is also interesting to note the two or three telephone companies who have allowed such advertisement after being called by Bennett have termed these advertising items as "mistakes" and "oversights" and will now promptly fall in line and be in the fold of Ma Bell." (109-110A).

That N.Y. TELCO and the other 22 operating subsidiaries of AT&T are not in the debugging business is simply ludicrous. Their argument on this point is rooted in the choice of the de-

fendants not to pursue such enterprise for substantial pecuniary gain. Instead, the defendants sought to characterize the performance of debugging services by the operating subsidiaries as the performance of repairs or system maintenance. The affidavit on behalf of defendants executed by William F. McGarty (94A) typifies the resort to semantics of the defendants, but buried therein is the following nugget: "In this respect, so-called 'debugging' service is indistinguishable from other more routine repair services rendered by TELCO to its subscribers." (96A). Taken in context, McGarty's statement is that the defendants cannot distinguish between repairs and debugging, and therefore must be presumed to engage in considerable "debugging" work. This conclusion is likewise substantiated by the testimony of CAMING. (124A).

The uncontroverted testimony adduced clearly showed that all paths ultimately travelled by those who would seek "debugging services" would lead back to the operating telephone company (in this case N.Y. TELCO) in the absence of a telephone subscriber's access to plaintiff's desired advertisement from the "Yellow Pages". (233-235A).

ARGUMENT.

POINT ONE: THE DISTRICT COURT DID NOT
ABUSE ITS DISCRETION IN
GRANTING A PRELIMINARY
INJUNCTION.

The preliminary injunction fashioned by the Court places no burden on the Defendants AT&T and DONNELLEY. It simply requires that they desist, with N.Y. TELCO, from refusing to publish the advertisement (336-A). N.Y. TELCO is not burdened since it is compensated under its own approved tariffs for inclusion of the advertisement in its "Yellow Pages" directories. In fact, none of the defendants suffer any real harm whatever.

The preliminary injunction supported by the balanced and well-supported findings and conclusions of Judge CANNELLA should remain undisturbed, since the plaintiff sufficiently satisfied the District Court that the restraint imposed by the defendants exceeded "...the limits reasonably necessary..." to accomplish the end of the defendants ("...the strongest possible protection of privacy of communication..." CAMING testimony, 130-A). UNITED STATES v. ARNOLD, SCHWINN & CO., 388 U.S. 365, 380 (1967).

The preliminary injunction enjoins the defendants

from refusing to accept the KATZ advertisement (336-A) by reason of non-compliance with the defendants' internal standards (295-A). The appellants claim that it is in reality a mandatory injunction couched in prohibitory form, but fail to justify, explain, detail or analyze this proposition [See App. Brief pp. 18-19].

Rather than direct the defendants to publish, the preliminary injunction limits the scope of prohibition to "...refusing to accept for publication...on the ground that it does not comply..." etc. By this device the District Court limited its order to and focused squarely on the cause of the litigation: the rigid dogma of A.T.&T. as preached from the pulpit of N.Y. TELCO. Consequently, there is no injunctive overbreadth when viewed either from the aspect of burden on the Appellants, or relief accorded TRIEBWASSER & KATZ. It is well recognized that "On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the question whether the court abused its discretion," UNITED STATES v. CORRICK, 298 U.S. 435 at 437-38, 80 L.Ed. 1263 at 1266 (1935) by reason of the fact that "...the application is addressed to the sound discretion of the court. ... The order denying the injunction, therefore, was conclusive in an appellate court; and an order granting it would

have been equally so. *BUFFINGTON v. HARVEY*, 95 U.S. 99, 100, 24 L.Ed. 381, 382." *RICE AND ADAMS CORP. v. LATHROP*, 278 U.S. 509 at 514, 73 L.Ed. 480 at 482 (1929).

Thus Appellants have the burden of establishing that there is clear error - either as a matter of law, *HENRY v. GREENVILLE AIRPORT COMMISSION*, 284 F. 2d 631 (4 Cir. 1960), or by reason of abuse or improvidence in the exercise of judicial discretion, *UNITED STATES v. CORRICK*, 298 U.S. 435, 56 S. Ct. 829, 80 L.Ed. 1263 (1963); *ROSELLI v. AFFLECK*, 508 F. 2d 1277 (1 Cir. 1974) - to be perceived readily from the record, and contrary to the finding of Judge CANNELLA that "However the existence of one such ad at this time will not significantly injure the defendants" (311-A).

Applying the rule that the determination below, whether it granted or denied the interim relief, should be disturbed only if discretion was abused, *UNITED STATES v. CORRICK*, supra, upon this review and following the rule in the Circuit, Judge CANNELLA's determination should receive the same consideration as was accorded the District Court's in *COLUMBIA PICTURES INDUSTRIES, INC. v. AMERICAN BROADCASTING COMPANIES, INC.*, 501 F. 2d 894, (1974):

"Of no small importance in reviewing Judge Palmieri's denial of a preliminary injunction is the fact that under the individual calendar system he will be the judge who will preside over the trial. His present judgment

as to issues of fact and law still unresolved should be entitled to the greatest consideration." Id. at 897.

A. THE RELEVANT CRITERIA FOR
ISSUANCE OF THE PRELIMINARY
INJUNCTION WERE OBSERVED.

This Circuit acknowledges the extraordinary nature of the remedy of preliminary injunction, *GULF & WESTERN INDUSTRIES, INC. v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.*, 476 F. 2d 687, 692 (2 Cir. 1973) and has explicitly enunciated the criteria for the grant of preliminary injunctive relief in private anti-trust suits:

"The standard factors which this court now considers upon an application for a preliminary injunction are well known: (1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or (2) sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly in favor of preliminary relief. *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F. 2d 247, 250 (2d Cir. 1973); *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*, 476 F. 2d 687, 692-693 (2d Cir. 1973)." *COLUMBIA PICTURES INDUSTRIES, INC. v. AMERICAN BROADCASTING COMPANIES, INC.*, 501 F. 2d 894 at 897 (2 Cir. 1974).

At page 3 of his Opinion (300-A) Judge CANNELLA quoted the same criteria from *SONESTA INTERNATIONAL HOTELS CORP. v. WELLINGTON ASSOCIATES*, 483 F 2d 247, 250 (2 Cir. 1973) which this Court a year later reaffirmed and upon which it relied in *COLUMBIA PICTURES*, supra.

Following the Circuit's decision in *COLUMBIA PICTURES*, supra, in July of 1974, Judge WERKER in October, 1974

in another private antitrust action, SUPERMARKET SERVICES, INC. v. HARTZ MOUNTAIN CORP., 382 F. Supp. 1248 (SDNY 1974) relied upon and applied the same criteria, word for word, as required by COLUMBIA PICTURES. See F. Supp. at 1254.

That Judge CANNELLA found "sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly toward the party requesting preliminary relief" alone was adequate, since the criteria, or "standard factors which this court now considers," COLUMBIA PICTURES, 501 F. 2d at 897, SUPERMARKET SERVICES, 382 F. Supp. at 1254, do and did not impose any other test or factors (except the alternative factors of "clear likelihood of success on the law and the facts then available and possible irreparable injury", SONESTA, supra at 250; COLUMBIA, supra at 897; SUPERMARKET SERVICES, supra at 1254) on the District Court.

B. 15 U.S.C. §26 IS NOT DONE
VIOLENCE BY THE "STANDARD
FACTORS" CONSIDERED BELOW.

Appellants place emphasis on the §16 Clayton Act private injunction statute wording, 15 U.S.C. §26, in an evident attempt to engraft an additional factor on those defined by the COLUMBIA PICTURES, SONESTA and SUPERMARKET SERVICES as the second set permissible to the District Court. See Appellants' Brief, page 17. Appellants would urge that the District Court be required to additionally find that there has been "...a showing that the danger of irreparable loss or damage is immediate,..." 15 U.S.C. §26.

In support of this proposition, this Court's decision in SCM CORPORATION v. XEROX CORPORATION, 507 F. 2d 358 (2 Civ. 1974) is advanced as enunciative of a departure from COLUMBIA PICTURES, SONESTA and SUPERMARKET SERVICES, all supra. However, the quotation employed by Appellants (Brief p. 17) is taken out of context.

In SCM, the first set of "standard factors" (clear likelihood of success on merits, and possible irreparable injury) were employed, as is evident:

"Those equitable principles are well established in this Circuit. Since Xerox has conceded liability for the purposes of the motion, SCM has only the burden of establishing the

possibility of immediate irreparable harm. *Pride v. Community School Bd.*, 488 F. 2d 321, 324 (2d Cir. 1973). While SCM has urged that its function as a private attorney general in enforcing the antitrust laws of the United States entitles it to particular consideration, it admittedly cannot escape its burden of establishing the threat of irreparable harm. The statute so requires and we are not free to disregard it." 507 F. 2d at 360.

In fact this Court immediately prior to that passage stated:

"The right of a private litigant in an anti-trust action to preliminary injunctive relief is provided for by statute, section 16 of the Clayton Act (15 U.S.C. §26), which states that such relief is available 'under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity... and [upon] a showing that the danger of irreparable loss or damage is immediate...'.
The statute is merely declarative of ordinary equitable principles. *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 742-743 (2d Cir. 1953)." 507 F. 2d at 360 (emph. supp).

The latter set of "standard factors", as disjunctively identified by this Court in applying the well-settled rule in *COLUMBIA PICTURES*, supra, are not inconsistent with the former, but appear to be a simple recasting of the language of the former set of "standard factors", for in both instances the first "factor" tracks the same concept (the "merits"), while the

second factor ("injury" or "hardship") does likewise. Consequently the criteria - the second set of "standard factors" - was available to the District Court. Applying now, as did Judge CANNELLA, the rule of the Circuit, then, the "irreparable injury" test as defined in SAMPSON v. MURRAY, 415 U.S. 61 (1974) need not be reached.

POINT TWO: THE DEVELOPED RECORD PROVIDED AN ADEQUATE BASIS FOR THE DISCRETION EXERCISED.

The District Court below expressly relied on the teaching of this Court (300-301A) enunciated in SONESTA and confirmed in COLUMBIA PICTURES for antitrust cases, and indeed in its fifteen page Opinion (298A) exhaustively sifted the record (303-312A) in an analysis which confirms the adherence and conformity of the ruling below with the criteria obtaining in this Circuit.

Appellants raise (Brief pp. 20-48) a range of arguments which are burdened with a plethora of citations, but these, it is respectfully submitted, are directed at a factual showing less substantial than revealed by the three hundred forty-one page Appendix before the Court.

Holding that the defendants intend(ed) to restrain trade, Judge CANNELLA wrote:

"This is one of the rare antitrust cases where the question of the defendants' intent need not be inferred, but is established by the words of the defendants themselves."
Opinion at 308A.

Contrary to Appellants' assertion of "no clear showing", the plaintiff made an offer of proof beyond its pleading and

affidavits, and the defendants themselves pressed for the hearing below on February 23, 1976 (171-72A) and smugly spurned the opportunity to rebut by any competent proof available to them (an assumption not lightly to be made) the testimony of plaintiff KATZ.

As with all aspects of this Court's review, the issue of "clear showing" is resolved by a reading of the Opinion of Judge CANNELLA (298A) which marshals the evidentiary matter upon which the preliminary injunction was granted (303-12A). In this regard, Appellees contend:

"The district judge's careful opinion read as a whole demonstrates that he gave full consideration to all of the factors involved in the light of the facts available to him, and, while another judge might have arrived at a different result, we cannot say that this result constitutes an abuse of the wide discretion normally accorded a district court on the issue of preliminary relief. Stark v. New York Stock Exchange, 466 F. 2d 743, 744 (2d Cir. 1972).

Here it is sufficient to say, without in any way indicating our views on the merits, that there are 'substantial, serious, difficult and doubtful' questions so 'as to make them a fair ground for litigation and thus for more deliberate investigation.' Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 740 (2d Cir. 1953)." COLUMBIA PICTURES INDUSTRIES, INC. v. AMERICAN BROADCASTING CO., INC., 501 F. 2d 894 at 897 (2 Cir. 1974) (Emph. supp.).

A number of spurious claims are set forth in Appellants' Brief, as follows:

- 1) "...the substantially uncontroverted affidavits of the defendant N.Y. TELCO disputing plaintiff's allegations." (p.21)
- 2) that no serious and substantive question was raised (p.22)
- 3) there is a lack of a conspiracy
- 4) there is no unreasonable restraint
- 5) there is no requisite interstate commerce aspect to this action
- 6) the balance of hardship does not tip decidedly in plaintiff's favor

The affidavits on behalf of the defendants, including the BENNETT affidavit (67A) and the McGarty affidavit (94A) are controverted and the appellants acknowledged this implicitly in that they themselves claim that the content thereof "disputes plaintiff's allegations." (Appellants' Brief p. 21).

With respect to the issue of the serious and substantial question raised below, the matter is resolved by a review of pages 6 through 8 of the District Court's Opinion (303-305A). That matter as well as that set forth on pages 4 through 8 generally establish an actionable conspiracy for the purposes of the preliminary injunction, (301-306A).

The questions of a restraint that is unreasonable

and the requisite interstate commerce aspect was sufficiently covered by the plaintiff's offer of proof and summarized in the Court's Opinion at pages 9 through 13 (306-310A).

Finally, plaintiff most certainly did establish that the balance of hardship tipped decidedly in its favor. Finding this language somewhat strained, and more accurately, the Court noted that it may be more apt to say that the balance of hardship tipped against the plaintiffs. In any event, the greater hardship, absent the preliminary injunction, is clearly borne by the plaintiff fledgling company whose ability to economically compete in a field of wholly legitimate enterprise is substantially foreclosed by the unilateral determination jointly of the defendants to suppress legitimate dissemination of the availability of plaintiff's services in the medium most closely identified with interstate communications in the minds of the public and over which the defendants have, so far, exercised absolute and exclusive control. Parenthetically, it should also be borne in mind that the lack of any earnings record on the part of plaintiff in its chosen field of endeavor and involving the specific service sought to be advertised, would presumably foreclose it from having the issue of damages reach a jury. Consequently, if damages could not be established, the injury if permitted to continue would in fact be irreparable by virtue of being speculative or incapable of calculation. The same would also be true of the loss of

business leads provided by satisfied clients on a prospective basis.

Believing that Judge CANNELLA's Opinion (298A) pithily states and supports appellees' position before this Court, Appellees have elected to reproduce and annex it hereto as an Appendix.

CONCLUSION

The Order of the District Court should remain undisturbed and Appellees should be awarded costs and disbursements on this Appeal.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

TRIEBWASSER & KATZ, a Partnership	:	
consisting of JONAH TRIEBWASSER	:	<u>OPINION</u>
and WILLIAM KATZ,	:	
Plaintiffs,	:	
-against-	:	76 Civ. 770
	:	(JMC)
AMERICAN TELEPHONE & TELEGRAPH	:	
COMPANY, NEW YORK TELEPHONE COMPANY	:	
and REUBEN H. DONNELLEY CORPORATION,	:	
Defendants.	:	

-----X

CANNELLA, D.J.:

Plaintiff's motion for a preliminary injunction is granted. The defendants are enjoined from enforcing the policy of the New York Telephone Company ("N.Y. Telco") embodied in the document attached as Exhibit C to plaintiff's complaint to the extent that such enforcement requires the defendants to refuse to publish plaintiff's advertisement, attached as Exhibit A to their complaint, in the Yellow Pages.

FACTS

The plaintiff in this case, Triebwasser and Katz, a partnership which was recently formed to engage in the business of a licensed private investigator, attempted

to place an advertisement in the Yellow Pages for the County of Queens which included the phrase "we can detect and remove unwanted and illegal electronic listening devices from your telephone, home or office." They were informed by representatives of the New York Telephone Company (the owner and publisher of the Yellow Pages) and of Reuben H. Donnelley Corporation (N.Y. Telco's sales agent for purposes of soliciting advertisements to be placed in the Yellow Pages) that the above advertisement was unacceptable in that it conflicted with N.Y. Telco's internal standards and practices governing the acceptability of ads for the Yellow Pages. In relevant part, these internal standards provide:

"ELECTRONIC", "ELECTRIC", "MODERN", AND
SIMILAR AMBIGUOUS WORDS OR STATEMENTS

The use of ambiguous phrases such as "Electronic", "Electric", "Electro", "Electronic Equipment", "Modern Aids", "Latest Devices", "Scientific Methods", "Technical Equipment", "Secret Equipment" may imply, and could readily be understood by directory users to imply that wiretapping, bugging, eavesdropping or debugging equipment is employed or is available.

Consequently, these words or phrases may not be used in copy unless they are qualified with additional, specific descriptive information that clearly discloses that a purpose other than [sic] wiretapping, bugging, eavesdropping or debugging is being advertised.

On February 17, 1976, the plaintiffs moved by way of order to show cause for a temporary restraining order and preliminary injunction. After a hearing before Judge Tenney, a temporary restraining order was issued which required the defendants to make a quarter of a page available in the Queens Yellow Pages for the plaintiff's ad with the understanding that if the preliminary injunction was denied the plaintiffs would nonetheless insert their ad, but that it would appear without the offensive language.

At the hearing on the preliminary injunction the plaintiffs offered proof to substantiate their claims that the defendants' actions were violative of the first amendment rights of the plaintiffs, and were unlawful under 15 U.S.C. § 1 and § 2.

THE LAW

It is well settled in this circuit, that a preliminary injunction will issue "only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief." Sonesta

Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2 Cir. 1973). Accord, Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 866 (2 Cir.) cert. denied, 419 U.S. 883 (1974); Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-93 (2 Cir. 1973).

The Court finds that the plaintiffs have satisfied the above standard in that their claim under Section 1 of the Sherman Act raises very serious questions going to the merits and the balance of hardships tips decidedly in plaintiffs' favor.

Under Section 1 of the Act conspiracies in restraint of trade are illegal. The facts before the Court indicate the existence of an intracorporate conspiracy which unreasonably interferes with competition in the field of electronic debugging.

A. Intracorporate Conspiracy

As the Second Circuit has stated, Section 1 of the Sherman Act "is directed only at joint action. Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 878 (1st Cir. 1966). It does not prohibit independent business actions and decisions. . . . Fundamental then to any § 1 claim is the finding of an agreement, express

or otherwise between two or more persons." Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 108-09 (2d Cir. 1975). In the instant case, the joint action which is allegedly violative of the Sherman Act is the policy of refusing to accept ads regarding debugging adopted by the American Telephone & Telegraph Company ("A.T.&T.") and followed by N.Y. Telco as well as most, if not all, of its other subsidiaries.

In United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947), the Supreme Court held that

The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act.

While the precise contours of the intracorporate conspiracy doctrine are unclear, the Supreme Court has held that a parent and its wholly owned subsidiary can conspire. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968). In the instant case the evidence regarding the establishment of the no-debugging ads policy "is sufficient to portray a plurality of actors concerting their efforts

toward a common end." George R. Whitten, Jr., Inc. v. Paddock Pool Bldg., Inc., 508 F.2d 547, 557 (1st Cir. 1974).

The affidavit of James R. Bennett, N.Y. Telco's Directory Supervisor-Field Operations, states that "A.T. & T. does not control Telco policy regarding the publication of Telco classified directories." While A.T. & T. does not "control" the policies of its subsidiaries as regards the publication of classified directories, its influence is strongly felt. Mr. Bennett himself, was "frankly surprised" (Affidavit at 17) when plaintiffs brought it to his attention that the classified directories of the Chesapeake & Potomac Telephone Co. as well as that of the Michigan Bell Telephone Company contained ads for debugging services. As Mr. Bennett's affidavit goes on to explain, however, these ads were the result of errors of oversight on the part of the telephone companies and according to the policy of both, will not appear in future directories.

More to the point was the testimony of William Caming, a member of A.T. & T.'s Legal Department, before the National Wiretap Commission. Mr. Caming's prepared statement included the following comments:

For more than three decades, it has been Bell System policy to refuse to accept in the Yellow Pages of its telephone directories advertisements by private detective agencies and others, stating or implying that the services being offered include the use of wiretapping. . . . This standard, adopted by all Bell System Companies, was interpreted from the outset to make equally unacceptable so-called debugging advertising (i.e., advertising stating or implying electronic devices or services will be provided for the detection and removal of wiretaps and eavesdropping "bugs"), on the theory that those who can debug also possess the capability to bug and wiretap.

Exhibit A to Answering Affidavit of William Katz at 863.

See also id. at 843-44. In response to a question asking Mr. Caming to clarify the meaning of the phrase "Bell System Policy", Mr. Caming stated:

MR. CAMING: Generally speaking, in the area of security matters, the policy of the Bell System is set by the American Telephone & Telegraph Company after appropriate review and concurrence by the associated companies.

For example, by way of graphic example, when Title III was enacted, we required procedures with respect to how to handle court-ordered wiretap requests. The initial procedures were prepared and carefully reviewed at ATOT [sic] and approved up to our highest levels of management. They were then presented to the presidents of each company at a joint conference, or I guess in this case they were sent to them after the conference. And their comments were invited and any suggested changes.

They were received and reviewed, and then the final document was established, and it was

sent out as Bell System policy.

In the last analysis, ATOT [sic] establishes the policy in conjunction with its associated companies and bears the responsibility for it.

MR. FELDMAN: And does that mean that ATOT [sic] has enforcement power?

MR. CAMING: In the sense that all the companies of the Bell System are committed to the strongest possible protection of privacy of communication, there has not been any need for enforcement of policy. I might say, parenthetically, that in all but two companies we have the whole controlling interest stockwise, and in those two companies we have a very substantial shareholder interest.

In light of the above, the Court finds that the plaintiff has raised serious questions going to the merits regarding the existence of a conspiracy between A.T. & T., N.Y. Telco and the other companies in the Bell System. Mr. Caming's testimony stresses the fact that while A.T. & T. sets the initial policy, each subsidiary is free to accept or reject it. Viewed from this perspective, the subsidiaries clearly constitute independent entities capable of conspiring with A.T. & T. *

* The fact that none of the co-conspirators compete with one another, in no way precludes a finding of conspiracy. *Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39, 44 (5th Cir. 1974).

B. Unreasonable Restraint of Trade

At the outset it must be recognized that the challenged practices relate solely to the defendants' actions in publishing classified directories. This case does not involve the highly regulated area of providing telephone services to the public, rather, it involves the completely unregulated activity of publishing classified directories. As Mr. Bennett of N.Y. Telco put it, "in its publication of Yellow Pages directories, Telco is essentially involved in a private enterprise publication activity." (Bennett Affidavit at 3). This enterprise is undertaken at great cost (the Manhattan Yellow Pages alone cost \$7,568,000 to produce) and provides "[a]ctual and anticipated revenues to New York Telephone Company [which] . . . substantially exceed the costs of publication." (Bennett Affidavit at 5).

Having concluded that there was a conspiracy involving A.T. & T. and its subsidiaries, the question becomes whether or not the policy regarding debugging advertisements which resulted from that conspiracy is an unreasonable restraint on trade. In determining whether a given restraint is unreasonable, the guidelines set out by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) give meaning to the

"rule of reason".

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

In attempting to apply the above, the Court is hampered by the somewhat barren factual record produced by the plaintiffs. Nevertheless, sufficient facts have been adduced to convince this Court that there are serious questions going to the merits on the issue of whether the restraint in question is unreasonable in that its goal and its probable consequence is to restrain competition in the debugging service industry in the metropolitan area.

This is one of the rare antitrust cases wherein the question of the defendants' intent need not be inferred, but is established by the words of the defendants themselves. As Mr. Caming explained in his testimony before the National Wiretap Commission, the no-debugging ads policy had its genesis in the belief that those who are capable of debugging are also capable of bugging, and that in order to prevent bugging it was necessary to refuse to accept any ads dealing with debugging services. Stated another way, in an attempt to make it as difficult as possible for the public to find individuals who would engage in bugging, A.T. & T. decided and N.Y. Telco agreed that it was necessary to make it as difficult as possible for the public to find individuals who would engage in debugging. To utilize the terms "motive" and "intent"; the defendants' motive was to protect the public from bugging but their intent was to restrain the public, to the best of their ability, from contacting debuggers. Such an intent is, of course, anti-competitive. While there are no facts before this Court indicating that A.T. & T. and its subsidiaries are attempting to restrain the debugging industry so that they themselves can control it, the lack of a predatory motive cannot negate the fact that the restraint is intended to and does in fact suppress competition.

find the law

As to the precise impact of the no-debugging ads policy, plaintiffs' proof is at best scant. Nonetheless, the testimony of William Katz indicated that the firm of Dektor Counterintelligence & Security Inc. of Springfield, Virginia, which does have an ad in the Northern Virginia Yellow Pages for 1975 indicating that the firm provides "telephone security systems" and "countermeasure surveys and inspection", obtains approximately 60% of its debugging business from their ad in the Yellow Pages (Answering and Supplemental Affidavit of William Katz at 8). Additionally, Mr. Katz's testimony and affidavit indicate that the F.B.I., the Chamber of Commerce, the New York Police Department and New York Telephone itself, all refer callers inquiring about debugging services to the Yellow Pages or New York Telco.

While the proof in this case may eventually disclose that numerous individuals seeking debugging services somehow find private companies ready, willing and able to perform the service, the Court nonetheless believes that the probable consequence of defendants' policy is that many individuals seeking private debugging services end up using N.Y. Telco as a result of the difficulty encountered in finding other companies capable

of performing the service.

Finally, this Court finds that the defendants have made no showing that the restraint imposed does not exceed "the limits reasonably necessary" to accomplish their avowed end. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967). This Court need not hold the defendants to a least restrictive alternative test (see American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-50 (3d Cir. 1975)) in order to find that the no-debugging ads policy as a means of controlling illegal wiretapping paints with too broad a brush.

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The Court is satisfied that the above showing is sufficient on this motion for a preliminary injunction to present serious questions going to the merits on the issue of the extent to which the defendants' policy restrains and suppresses the debugging business.

THE BALANCE OF HARDSHIPS

The balance of the hardships in this case tips decidedly in favor of (it may be more apt to say against) the plaintiffs. Mr. Katz testified that he and his partner had projected that 50 to 60 percent of their income would be generated by counter-measure business

(i.e., the detection of electronic devices in the home, office and telephone). The exclusion of their ad from the Queens Yellow Pages will undoubtedly result in harm to their fledgling business, a harm which will be quite difficult to compute in terms of money damages. Further, Mr. Katz's testimony and affidavit state that the cost of advertising in alternative media in order to reach a comparable number of potential clients would be prohibitive.

From the defendants' perspective, the issuance of the instant injunction precludes them from enforcing a policy which they believe is in the public interest.

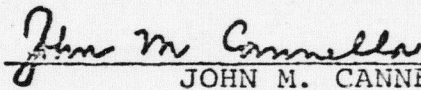
However, the existence of one such ad at this time will not significantly injure the defendants. As the proof indicated, it sometimes occurs that as a result of an oversight, ads similar to the plaintiffs' appear in various yellow pages. Additionally, there has been no allegation by the defendants that these plaintiffs intend to engage in any illegal wiretapping. Finally, if the defendants prevail at trial, they will be able to remove the offending ad from Yellow Pages next year and thus end any harm suffered. From the plaintiffs' perspective, however, the impact of exclusion from this year's book will be felt not only this year but in each succeeding

year in that every client they fail to get means some unquantifiable number of other clients they will not acquire in the future as a result of referrals or old customers returning.

For all of the above reasons,* the Court concludes that the plaintiffs have clearly shown serious questions going to the merits which are a fair ground for litigation, and a balance of hardships tipping decidedly in their favor.

The foregoing constitute the Court's findings of fact and conclusions of law upon plaintiffs' application for a preliminary injunction.

SO ORDERED.



JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
February 26, 1976.

* In light of the Court's finding on the Section 1 claim, plaintiffs' other claims need not be addressed at this time.

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SECOND CIRCUIT
DOCKET NUMBER 76-7095

AFFIDAVIT OF SERVICE

(SDNY Docket Number
76 CIV 770-JMC)

Defendants-Appellants.

.....X

FRANK GONZALEZ, being duly sworn, deposes and says:

2. On April 9, 1976, I served the within Brief of Plaintiff-Appellees upon CLEARY, GOTTLIEB, STEEN & HAMILTON, attorneys for Defendants-Appellants in this action, at One State Street Plaza, New York, New York.

3. Service was effected by my personally delivering two copies of the aforementioned Brief and leaving them with a person in charge of the offices.

Sworn to and subscribed before me
this 9th day of April, 1976.

FRANK GONZALEZ

NOTARY PUBLIC

JOHN W. FINLEY, JR.
Notary Public, State of New York
No. 31-6299315
Qualified in New York County
Commission Expires March 30, 1978

BRASHICH, FINLEY AND POSTEL

STATE OF NEW YORK, COUNTY OF

SS.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
☐ Attorney's Affirmation shows: deponent is

Check Applicable Box

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Individual Verification the being duly sworn, deposes and says: deponent is in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.
☐ Corporate Verification the of in the within action; deponent has read the foregoing a corporation, and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

is over 18 years of age and resides at being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.
☐ Affidavit of Personal Service On 19 at upon deponent served the within

Check Applicable Box

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

The name signed must be printed beneath

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

BRASHICH, FINLEY AND POSTEL

Attorneys for

Office and Post Office Address

501 Madison Avenue

Borough of Manhattan New York, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,

BRASHICH, FINLEY AND POSTEL

Attorneys for

Office and Post Office Address

501 Madison Avenue

Borough of Manhattan New York, N. Y. 10022

To

Attorney(s) for

SECOND CIRCUIT DOCKETNUMBER
~~XXXXXX~~ 76-7095 ~~XXXX~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRIEBWASSER & KATZ, a partnership
consisting of JONAH TRIEBWASSER and
WILLIAM KATZ,

Plaintiff-Appellees,

- against -

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
NEW YORK TELEPHONE COMPANY and REUBEN
H. DONNELLEY CORPORATION,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

BRASHICH, FINLEY AND POSTEL

Attorneys for Plaintiff-Appellees.

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Borough of Manhattan New York, N. Y. 10022

Tel. (212) PLaza 5-1500

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for